IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

CRL.A.No. 2 of 2003()

SC.201/2001 of ADDL. DISTRIC & SESSIONS (AD HOC) FAST TRACK COURT NO.1, MANJERI

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APPELLANT: ACCUSED NOS 1 AND 2

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1. MOOSAKUTTY S/O. MUHAMMED, PANAKKAL HOUSE KANNATTIPPADI, VENGARA.

2. KILIYAMANNIL ABU ALIAS ABOOBACKER, S/O. ALI, CHEMMANKADAVU, KADOOR AMSOM.

BY ADVS. SRI.M.K.DAMODARAN (SR.)
SRI.K.M.SATHYANATHA MENON

RESPONDENT: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, ALONG WITH CRA NO. 323 OF 2003 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P.NO.16 OF 2003 IN CRL. APPEAL NO. 2 OF 2003.

DISMISSED

2.7.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NOS.2 & 323 OF 2003

Dated this the 2nd day of July, 2007

JUDGMENT

Accused Nos. 1 and 2 in Sessions Case No.201 of 2001 on the file of the Additional District and Sessions (Ad hoc) Fast Track Court No.I, Manjeri are the appellants. Both the accused faced trial for the offences punishable under Sections 376, 306 and 313 read with Section 34 I.P.C.

2. The prosecution case against the accused was that while deceased Salmath, daughter of Muhammed, Madhurakkanian veedu, Velumbiyampattom was working as maid servant in the house of the first accused, he committed rape on her on several occasions, six months prior to 6.10.1996. It was further alleged that when the said Salmath became pregnant, she was taken to Nadakkavu Hospital, Calicut on 15.7.1996 where her pregnancy was terminated without her consent and that the second accused signed the consent letter before the doctor as if he was the husband of deceased Salmath. The further case of the prosecution was that as the first accused failed to keep his promise to marry deceased

Salmath, on 6.10.1996 she set herself ablaze after pouring kerosene on her at her sister's house and thereby the first accused abetted her to commit suicide. On the above allegations, charge was framed against both the accused. To prove the case against the accused, the prosecution examined PWs.1 to 38 and produced Exts.P1 to P55 as well as MOs.1 to 11. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. Both the accused denied the allegations levelled against them. However, the trial court found the first accused guilty under Sections 376, 313 and 306 I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of seven years each under Sections 376, 306 and 313 I.P.C. and to pay a fine of Rs.1000/- under each sections and in default of payment of fine, to undergo simple imprisonment for a period of one year under each of the sections. The sentences were ordered to run concurrently. The second accused was found guilty under Section 313 read with Section 34 I.P.C., he was convicted thereunder and sentenced to undergo rigorous imprisonment for a term of seven years under Section 313 I.P.C. and to pay a fine of Rs.1000/- and in default of payment of fine, to undergo simple imprisonment for a period of one year. Both the accused were given the benefit under Section 428 Cr.P.C. The above judgment of the trial court is

challenged in these appeals.

3. Crl. Appeal No.323 of 2003 is filed by the second accused through the jail authorities. Crl. Appeal No.2 of 2003 is filed by both the accused through their counsel. Since both these appeals are posted together for hearing, this Court heard the learned counsel appearing for the appellants, the State Brief as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellants mainly urged four points: (i) the finding entered by the trial court was based only on the dying declaration of deceased Selmath and that there was no independent evidence to prove the prosecution case, (ii) the trial court did not consider the fact that the evidence of PWs.1 to 8 did not support the prosecution case, (iii) the reliance placed by the trial court on the evidence of PWs.23, 30 and 31 is perverse and (iv) except the dying declaration of deceased Selmath, there was no other evidence or circumstance to find the appellants guilty of the charges and that there was ample evidence to show that the deceased was not in a fit condition to give such a declaration after having sustained 100% burn injuries. To substantiate the above contentions, learned counsel for the appellants placed reliance on the decisions of the Apex Court reported in **Munnu Raja v. State of**

Madhya Pradesh, A.I.R. 1976 S.C. 2199, Paparambaka Rosamma v. State of A.P., 1999 S.C.C. (Cri.) 1361, Panchdeo Singh v. State of Bihar, 2002 Crl. L.J. 973, Ramilaben Hasmukhbhai Khristi v. State of Gujarat (2002) 7 S.C.C. 56, Chacko v. State of Kerala (2003)1 S.C.C. 112 and **Mohan Lal and Ors. State of Haryana, JT 2007 (3) SC 602**.

5. Before considering the contentions raised by the learned counsel appearing for the appellants, it is advantageous to see the evidence adduced by the prosecution to prove the charge against the appellants. PWs.1 to 16 are near relations and neighbours of deceased Salmath. All these witnesses turned hostile to the prosecution. Though PW.1, the mother of deceased Salmath, PW.2, the sister of Salmath and PW.3, the husband of PW.2 were examined to prove the employment of deceased Salmath as maid servant in the house of the first accused, these witnesses stated that they were not aware of any such employment. They also stated that they did not know the first accused. Hence, the prosecution was left with the evidence of the other witnesses, namely, the police officials who registered the crime, questioned the witnesses and investigated the case and PW.23, the doctor who examined deceased Salmath on 6.10.1996 when she was admitted at the Government Hospital, Nilambur. The prosecution also relied on the evidence of PWs.28 and 29

who were the doctors alleged to have been involved in the medical termination of pregnancy of deceased Salmath on 15.7.1996. The prosecution also relied on the evidence of PW.30 who was the Junior Superintendent of the Judicial First Class Magistrate Court, Nilambur, PW.31, the Sub Inspector of Police, Nilambur during the relevant time who had recorded Ext.P40 first information statement given by deceased Salmasth on 6.10.1996, PW.33, the police officer who filed the charge against the appellants, PW.36. the doctor who proved Ext.P45 postmortem certificate issued by Dr. Sunil Babu who had conducted autopsy on the body of deceased Salmath and PW.38, the Circle Inspector of Police, Malappuram who conducted investigation of the case.

6. The trial court found that though there was no direct evidence to prove that the appellants committed the offences as alleged, Ext.P38 dying declaration of deceased Salmath recorded by PW.23 would prove that the appellants committed the offences alleged against them. The question to be considered in these appeals is whether the finding of the trial court is sustainable or not.

7. Admittedly, there was no direct evidence before the trial court to prove that deceased Salmath was employed as maid servant in the house of

the first accused and that he had committed rape on her on several occasions as a result of which she became pregnant and that her pregnancy was terminated without her consent. The trial court relied on the evidence of PW.23 who had examined deceased Salmath at about 9.20 a.m. on 6.10.1996. PW.23 had given evidence before the trial court that on 6.10.1996 while he was working as Assistant Surgeon, Government Hospital, Nilambur, deceased Salmath was brought to the hospital with 90% burn injuries on her body. He also stated that the girl was conscious though her condition was critical and hence he reported the matter to the police. He further stated that on the basis of the request made by PW.31, the Sub Inspector of Police, Nilambur, he recorded Ext.P38 dying declaration of deceased Salmath, forwarded the original to the Judicial First Class Magistrate's Court, Nilambur in a sealed cover and retained a carbon copy of the same which was produced as Ext.P26. The evidence of this witness would show that even though deceased Salmath was conscious, her condition was critical and that she had revealed the reason for committing suicide. During cross-examination, this witness stated that the original of Ext.P26 was entrusted to the hospital superintendent in a sealed cover.

8. The prosecution tried to corroborate the evidence of this witness

with the evidence of PW.31, Sub Inspector of Police, Nilambur. PW.31 deposed before the trial court that he got information from the Government Hospital, Nilambur that a woman was brought to the hospital with serious burn injuries and that on getting the information, he went to the hospital at about 9.40 a.m. and recorded Ext.P40 statement of deceased Salmath. He further stated that as deceased Salmath was in a critical condition and as the Magistrate was on leave, he requested PW.23 to record the dying declaration of deceased Salmath. Ext.P41 is the written request of PW.31 to PW.23 for recording the dying declaration. This witness further stated that later he was informed about the death of deceased Salmath whereupon he went to the hospital and on the basis of the direction of the Circle Inspector of Police, Nilambur conducted inquest and thereafter he sent Exts.P40 and P41 to the Station House Officer, Edakkara for further action. On the basis of the records received at Edakkara Police Station, Crime No.207 of 1996 was registered which was later transferred to Vengara Police Station and registered as Crime No.128 of 1996 and PW.27. Sub Inspector of Police, Vengara took up the investigation. PW.38, the Circle Inspector of Police, Malappuram took up further investigation and questioned the witnesses till 2000. Thereafter PW.33, the Circle Inspector of Police took up the investigation of the case. This witness deposed that he took up investigation of the case in June, 2000 and

had taken into custody Exts.P26 and P26(a), the carbon copies of the dying declaration and the covering letter as per Ext.P44 mahazar from PW.23. PW.30, the Junior Superintendent of the Judicial First Class Magistrate's Court, Nilambur had given evidence to the effect that he had produced before the court below Exts.P38, 37 and 39 which are the originals of Ext.P26 dying declaration of deceased Salmath, the covering letter and the envelope in which Ext.P38 has been sent to the court. He further stated that Exts.P37 and P38 were kept unattended in the almirah of the court. The trial court accepted the evidence of PW.23 who had produced Exts.P26 and P26(a) and found that Exts. P38 and P37 were the originals of Exts.P26 and P26(a).

9. In the light of the contentions raised by the learned counsel appearing for the appellants, it has to be considered whether the evidence of PW.23 who had examined deceased Salmath on 6.10.1996 can be accepted. PW.23 had deposed that when he examined deceased Salmath, she was conscious though her condition was critical. This witness also stated that the statement given by deceased Salmath revealed that she was working as maid servant in the house of the first accused six months prior to 6.10.1996 and that she was raped by the first accused on several occasions on the promise that he would marry her. It was also revealed

from the evidence of PW.23 that when the deceased Salmath became pregnant, she was taken to Nadakkkavu Hospital, Calicut where her pregnancy was terminated by PWs.28 and 29 without her consent and that the second accused had signed the consent letter as if he was the husband of deceased Salmath. On cross-examination, PW.23 stated that though deceased Salmath was brought to the hospital with 90% burn injuries, she was alert and conscious and that she had answered all the questions put to her. At the same time, PW.36 who had proved Ext.P45 postmortem certificate issued by Dr. Sunil Babu in which it was recorded that the deceased Salmath suffered first, second and third degree burns deposed that a person suffering from first, second and third degree burns will be in great pain and in a state of shock. PW.36 also stated that a person in such a condition cannot speak eloquently. Ext.P45 postmortem certificate would reveal that the entire body of the deceased Salmath was charred and that postmortem staining was not identified due to burns. The evidence of PW.36 causes doubt regarding the version given by PW.23. Ext.P40 first information statement recorded by PW.31 is also similar to the statement contained in Ext.P26 dying declaration of deceased Salmath. PW.31 when cross-examined admitted that the condition of deceased Salmath was very serious and that she was suffering from great pain. If that be so, the evidence of PWs.23 and 31 in so far as they have stated that deceased

Salmath answered their questions clearly cannot be accepted. Further the statement of PW.23 that he had kept the copy of the dying declaration of deceased Salmath from 1996 to 2000 also cannot be believed. Even if PW.23 had recorded the dying declaration, there was no corresponding records sent either to the Sub Inspector of Police, Nilambur or to any other officers with regard to the recording of the statement.

10. Another aspect to be considered in this regard is that when PW.23 was questioned on 14.10.1996, he had not given any information regarding Exts.P26 or P26(a) to the Investigating Officer. Further, when the Investigating Officer visited the place of incident, he had taken into custody MO.9, the suicide note alleged to have been written by deceased Salmath, the contents of which are entirely different from what was recorded by PW.23. The fact that the versions in MO.9 and Ext.P26 are different creates doubt regarding the genuineness of Ext.P26. Another aspect to be considered in this context is that Ext.P40 statement of the deceased Salmath recorded by PW.31 is very similar to Ext.P38 dying declaration. PW.31 had also stated that he had obtained partial thump impression of deceased Salmath in Ext.P40. On the basis of the evidence of PW.36, this Court has already found that deceased Salmath was suffering from acute pain and that she was under shock when she was

brought to the hospital. If that be so, the statement given by deceased Salmath might not be as recorded in Ext.P38 or Ext.P40.

11. Apart from the above infirmity, this Court has to consider once again the evidence of PW.30 regarding the production of Exts.P37, P38 and P39 before the trial court. This witness had stated that while he was working as Junior Superintendent in the Judicial First Class Magistrate's Court, Nilambur, he had seen some unattended documents. He further stated that those documents were the originals of Exts.P26 and P26(a) alleged to have been received from the Government Hospital, Nilambur. In this context, the evidence of PW.34 who was holding the additional charge of the Circle Inspector of Police, Malappuram is relevant. This witness had stated during the year 2000, he had submitted an application to the Judicial First Class Magistrate's Court, Nilambur for getting a copy of the dying declaration of deceased Salmath and had even sent a police constable for getting the copy, but he was informed that the said document was forwarded to the Judicial First Class Magistrate's Court, Malappuram. If that be so, the evidence of PW.30 with regard to the production of Exts.P37, 38 and 39 is not free from doubt.

12. Yet another fact to be considered by this Court is whether

deceased Salmath was in a fit mental condition to give Ext.P38 dying declaration. In this context, the evidence of PW.36 and Ext.P45 postmortem certificate assume relevance. When PW.23 examined deceased Salmath on 6.10.1996, he had noticed that the body of deceased Salmath was charred. It is stated in Ext.P45 postmortem certificate that the brain was congested, all midline structures of neck were intact, air passages contained black soot particles, lungs were congested and chambers, valves and coronary arts. of heart appeared normal. As per Ext.P45 postmortem certificate, death was due to first, second and third degree burns involving the whole body (100% burns). PW.36 who had proved Ext.P45 postmortem certificate issued by Dr. Sunil Babu stated that a person suffering from great pain and in a state of shock cannot speak eloquently. He also stated that one of the reasons for shock was pain. When questioned as to whether the body will induce shock to retire the body from painful condition, he answered in the affirmative. On the basis of the evidence given by this witness and the statement contained in Ext.P45, this Court is of the view that the prosecution has not proved beyond reasonable doubt that deceased Salmath was in a fit condition to give Ext.P26 dying declaration to PW.23. This Court is also of the view that the prosecution ought to have proved that deceased Salmath was in a fit mental condition to give the dying declaration as stated by PWs.23 and

31. It has come out in evidence that deceased Salmath was brought to the hospital at about 9.20 a.m., PW.23 examined her and recorded the so called dying declaration. It has also come out in evidence that when PW.31 questioned deceased Salmath and recorded her statement, she was in a serious condition and that PW.31 requested PW.23 to record the dying declaration under Section 32 of the Indian Evidence Act, 1872. There is no corresponding records to show that such a request was made by PW.31 to PW.23.

13. Learned counsel appearing for the appellants placed reliance on the decision of the Apex Court reported in **Paparambaka Rosamma v. State of A.P., 1999 S.C.C. (Cri.) 1361** is relevant. In the above judgment, the Apex Court had held that in a case where the deceased had sustained extensive burn injuries on her person and the doctor who performed the postmortem stated that the injured had sustained 90% burn injuries and the prosecution case solely rested on the dying declaration, it was necessary for the prosecution to prove the dying declaration as being genuine, true and free from all doubts and recorded when the injured was in a fit state of mind. Learned counsel also invited the attention of this Court to the decision reported in **Panchdeo Singh v. State of Bihar, 2002 Crl.L.J. 973** where the Apex Court had taken a similar view and

concluded that declaration must be such so as to evoke confidence in the factual context. The evidence given by PW.23 was that he had recorded the dying declaration of deceased Salmath and that deceased Salmath was conscious at the time of recording her statement, but he had no case that he had certified in Ext.P38 that deceased Salmath was in a fit condition to give the dying declaration as alleged by the prosecution. Even accepting the prosecution case that deceased Salmath was employed as maid servant in the house of the first accused, there is no nexus between her death and the facts tried to be proved by the prosecution which led to her suicide. In this context, the evidence of PWs.28 and 29, the doctors who caused the medical termination of pregnancy of deceased Salmath, is very relevant. PW.28 had stated before the court below that on 15.7.1996, a girl named Salma was brought to her hospital by one Aboobacker who claimed to be her husband and that on the basis of the consent letter signed by the said Aboobacker, M.T.P. was done by PW.29. This witness also identified Exts.P33 and P34 documents relating to the M.T.P. PW.29 deposed before the court below that M.T.P. was done on the basis of the consent given by the said Salma and her husband. The prosecution had not proved whether the said Aboobacker who had accompanied deceased Salmath was her husband. There is also no evidence regarding the investigation conducted by the police on that aspect. The fact that the

second accused was questioned at Nasik jail is doubtful. The prosecution also failed to prove that deceased Salmath committed suicide due to the medical termination of her pregnancy. The evidence adduced by the prosecution regarding the dying declaration made by deceased Salmath does not appear to be convincing.

14. Considering the entire evidence and on hearing the learned counsel appearing on either side, this Court is of the view that the prosecution has not proved the case against the appellants beyond reasonable doubt and the finding of the trial court is not sustainable. In the above circumstances, the appellants are entitled to the benefit of doubt. Accordingly, the judgment under appeal is set aside. The appellants are found not guilty of any of the offences alleged against them and they are acquitted. The appellants were granted bail by this Court as per order dated 3.1.2003 in Crl.M.P. No. 16 of 2003. It is reported that the second accused has not executed the bond and he is still in custody. Hence, the bail bonds executed by the first accused in S.C. No.201 of 2001 on the file of the Additional District and Sessions (Ad hoc) Fast Track Court No.I, Manjeri who is the first appellant in Crl. Appeal No.2 of 2003 shall stand cancelled. The second accused in the above Sessions Case who is the appellant in Crl. Appeal No.323 of 2003 and the second

appellant in Crl. Appeal No.2 of 2003 shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeals are allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NOS.2 & 323/2003

JUDGMENT

2ND JULY, 2007